No. 11,851

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON W. JONES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

This is an appeal in two cases, consolidated for trial, from separate judgments of the District Court for the Territory of Alaska, Fourth Judicial Division, sentencing the defendant to life imprisonment in an institution of the penitentiary type in each case, sentences to run concurrently. Said judgments were entered on the 11th day of December, 1947 (R. 36-40), pursuant to a jury trial and verdicts of "guilty * * * but without capital punishment" (R. 31, 32) of the alleged crimes of murder in the first degree as charged in the two indictments, each based on Section 4757 of the Compiled Laws of Alaska, 1933 (R. 1-4). Notice of appeal was filed on the 30th day of December, 1947.

(R. 65, 66.) The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chap. 786, 31 Stat. 322, as amended (48 U.S.C. Sec. 101, likewise constituting Sec. 1091, C.L.A., 1933, p. 273). The jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code, as amended (28 U.S.C. Sec. 225(a), now 28 U.S.C. New, Sections 1291, 1294).

QUESTIONS PRESENTED.

(1) Whether the evidence proved that the defendant was so intoxicated that he was incapable of purposely and with deliberation and premeditation committing the crimes of murder in the first degree as charged in the indictments.

(2) Whether the Government had sufficiently removed every other reasonable hypothesis as to the commission of the crimes so as to convict the defendant of the crimes of murder in the first degree as charged in the indictments.

(3) Whether the evidence claimed to be newly discovered in this case warranted the granting of the motion for a new trial.

Leon W. Jones will be referred to herein as the appellant, the designation used by his attorney in appellant's brief.

STATUTES INVOLVED.

Section 5341 of the Compiled Laws of Alaska, 1933, provides:

> "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degrees of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act. (2251-CLA)."

Section 5373 of the Compiled Laws of Alaska, 1933, provides in part:

> "The former verdict or other decision may be set aside and a new trial granted, on the motion of the defendant, for any of the following causes materially affecting the substantial rights of such party: * * * Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial * * *"

COUNTER STATEMENT OF THE CASE.

On Sunday evening, July 20, 1947, the Government's witness, Therriault, in his car, transported the defendant, Leon W. Jones, and Donald R. Harris, one of the victims, from their construction camp at Big Delta, Alaska, on the Alaska Highway southerly a distance of some thirty miles, to the cabin of Carl

Oscar Ahnstrom, the other victim in this case. Just beyond the Ahnstrom cabin stands a second cabin occupied by an Indian family. Both cabins are located a short distance to the left (north) of said highway just after it crosses the Little Gerstle River. Therriault stopped his car on the side at the south end of the Ahnstrom cabin and agreed to stand by for one hour while the defendant and Harris, who had both been drinking beer and carried an unopened whiskey bottle with them, proceeded on foot to the Indian cabin. While Therriault waited, Ahnstrom, an elderly man who had had a stroke the year before, came out of his cabin and the two engaged in conversation for about forty minutes; that is, from 8:00 o'clock until about 8:40 o'clock that evening. (R. 73-78, 83-92, 192.)

Meanwhile, the defendant and Harris entered the Indian cabin occupied by Frank Felix, a sick Indian with heart trouble, his wife, Ellen, and their small children, and drank whiskey out of the bottle with Mr. Felix, carried on some conversation and then quarrelled over going home, Jones wanting to go and Harris hanging back. The Indian children became frightened at the men; so Ellen ordered them out of the house. (R. 94-96, 101-111, 134-138, 141-145, 154, 155.)

As the two men came out of the Felixs' cabin, they were "scuffling" and exchanging some blows. Harris, who appeared to be quite drunk, was getting the worst of the encounter and tried to run away from the defendant but fell down in the area between the two cabins which were about 75 feet apart. At this point,

Therriault came up and asked Jones if it wasn't about time to return to camp. The latter, in a hostile mood, told Therriault to mind his own business and get out of there. So Therriault got into his car and drove back to Big Delta, where he immediately reported the incident to a camp foreman. As Therriault pulled out on to the main highway, he looked back and saw Ahnstrom still standing by his cabin. As they watched the outdoor struggle between Jones and Harris through their cabin window, the Felixs became frightened and took to the woods with their children. (R. 75, 78, 79, 90, 91, 93, 110, 111, 138, 141, 146, 149, 153-155.)

Felix remained in the woods with the children, while Ellen and another young Indian woman, Margaret Jacobs, whom they had summoned from an Indian camp about three-quarters of a mile from the Felixs' cabin, returned by a trail to said cabin to get food and a blanket for the children. Just outside the cabin, the women saw the dead body of Carl Ahnstrom but no weapon. They did not see Harris but heard someone making a dying moan near Ahnstrom's cabin, and they saw a man on the Little Gerstle bridge, whom Ellen identified as the defendant, pounding on the bridge and hollering. They hurried to the other natives in the woods and then all went by trail to Stanley Young's trading post, about 4½ miles distant, where they reported the homicide and remained until the officers arrived the next day. (R. 97, 99, 100, 111, 115, 116, 120-124, 131, 139, 140, 147, 150-152, 158-170.)

On the following day, July 21, 1947, representatives of the United States Marshal, the Alaska Highway Patrol, the Federal Bureau of Investigation, and the United States Army arrived at Little Gerstle, the first ones getting there at about 2:30 A. M., and found the bloody body of Donald R. Harris with the neck chopped open and another cut wound across the right collar bone, lying in front of Carl Ahnstrom's cabin, and the body of Carl Ahnstrom lying face down at the rear of Felixs' cabin. There was a bloody, double-bitted ax lying about three feet from Harris' body and a pair of eyeglasses, with one lens broken, near the head. From Harris' mouth was hanging a Camel cigarette that had a little blood where the lips touched it and that appeared to have been slightly burned at the end. In Ahnstrom's back were two deep wounds cut through the shirt he was wearing, and over this was spread an extra khaki shirt. There was also a rather superficial wound on the neck and another on top of the head. On the ground, in the crook of Ahnstrom's left arm, was found an unopened package of Camel cigarettes. (R. 172-189, 227, 239-242.) It is to be noted that Ahnstrom, when alive, had smoked a pipe. (R. 129.)

The Government's medical expert, who performed the post-mortem on both bodies, found that the two deep wounds in Ahnstrom's back penetrated the tissue of the lungs and caused death. The death of Harris he attributted to the neck wound which had severed the great blood vessels and the spinal cord. All of these wounds could have been made with Ahnstrom's ax found near Harris' body. (R. 211-225.)

On said July 21, 1947, pictures were taken of the bodies of the victims and of the scene of the crime and were later duly identified. Measurements were observed showing the distance from the bridge to the side road to be about 100 yards; from the side road to the Ahnstrom cabin, about 60 yards; and from the northeast corner of Ahnstrom's cabin to the southeast corner of the Felix cabin, 57 feet. Close to the northeast corner of Ahnstrom's cabin stood a tree stump and a saw horse. (R. 224-250.) The ax found beside Harris' body was identified as the one Ahnstrom kept in the stump just mentioned. (R. 99.)

Across the bridge from the Ahnstrom cabin at Little Gerstle and a short distance removed from the bridge, is a valve box of the Canol Pipe Line. Here on said 21st day of July, 1947, the officers found some clothes scattered about on the ground outside the box. These clothes, with the exception of a pair of brown pants, had been left in the valve box several days before by a native man, Merle Marie. The pants, when found, were badly rumpled up, wet up to the knees, and carried quite a bit of glacier sediment, or sand. As Frank Felix had reported to the officers that "the white man" had gone down towards Healy Village, referred to above as an Indian camp, said officers proceeded there, following certain tracks or footprints all the way from the valve box. At the village, they found that one of the cabins had been entered and things therein thrown around. They also found a pile of empty boxes of .22-calibre rifle cartridges. They followed the trail on down to the Little Gerstle

river, where they lost it. Along the trail they discovered four chained sled dogs, recently shot to death. (R. 176-178, 186-189, 196-205, 244.)

Road blocks along the Alaska Highway were immediately established and an intensive man-hunt undertaken. Ten days later, July 31, 1947, the defendant was apprehended at Johnson River, along the Alaska Highway, wearing a hat, and torn shirt and pants, with a blanket tied on his back and carrying a .22-calibre rifle. When first asked his name, he did not give his true name. On the drive into Fairbanks that day, he told the officers where he had been and how he had lived in the brush. He also stated that he would have tried to make it over the mountains to the coast and start all over again, but he was glad that it was all over with. When questioned if he got the gun where he killed the dogs, the defendant answered, "Yes". (R. 287-290, 229, 230, 365.)

Incidentally, the gun in question which belonged to Alice Joe, and the aforementioned blanket, the property of Mrs. Jane Healy, had been left behind by their owners at the Indian Camp when they accompanied Merle Marie to George Lake two days before the death of Harris and Ahnstrom. Margaret Jacobs was the last to see these two items, still in the Camp, when she left there with the Felixes on the night of the killings. (R. 159, 170, 207-209, 369.)

Early on the morning of August 1, 1947, when questioned in the United States Marshal's office, the defendant told of events leading up to the tragedy at Little Gerstle and what transpired afterwards until

the time of his arrest but would not discuss the actual homicides themselves. At that time, he was shown the following items and identified them as belonging to himself: (1) The khaki shirt found over Ahnstrom's body; (2) the glasses found near Harris' body; (3) the brown trousers found by the valve box; (4) Ingram pocket watch taken from the above mentioned trousers; (5) tool-chest key attached by key chain to said watch; and (6) handkerchief also taken from said trousers. (R. 261-268.)

On August 8, 1947, the defendant reiterated to Bureau agents and a Deputy Marshal the same story that he related a week before. On this occasion he added, "I don't deny that I killed them (meaning Ahnstrom and Harris). I don't know how * * * I knew that I did, or I must have, because I left and went into the brush. Otherwise, why would I have left and run?" (R. 276-283.)

Peter G. Duncan, a Special Agent of the Federal Bureau of Investigation assigned to the F.B.I. Laboratory in Washington, D. C., made a laboratory analysis of certain blood specimens, clothing and other items submitted to him for examination in this case and found: (1) The blood of Leon W. Jones, the defendant, belongs to International Blood Group "O"; (2) the blood from the dead bodies of Ahnstrom and Harris was putrified and, therefore, unsuitable for analysis; (3) the blood found on the shirt, trousers and T-shirt removed from the body of Harris was all from a person belonging to Group "A"; (4) the blood found on the shirt, pants and underwear worn by

Ahnstrom at the time of his death was all from a person belonging to Group "O"; (5) the *soaked-in* blood on the back of the khaki shirt found spread over Ahnstrom's dead body belonging to Group "O", while the *splashed-on* blood found on the left sleeve of said khaki shirt belonged to Group "A"; (6) some of the human blood on the ax found at the scene of the crime belonged to Group "O", while other blood on the same ax belonged to Group "A"; (7) a human blood stain found on the waist band at the left hand of defendant's trousers found at the valve box was insufficient in quantity to permit Group determination; (8) blood on the glasses found near the body of Harris and blood on chips of wood taken from the floor of the Felix cabin and from the ground between the Ahnstrom and Felix cabins all came from a person belong to Group "A"; and (9) human blood on the cigarette taken from the mouth of Harris' body belonged to Group "A" (R. 291-303).

Testifying in his own behalf, defendant corroborated the witnesses of the Government as to all events that transpired on the fatal day up to the time that Ellen Felix ordered him and Harris out of the cabin. Then his mind became a complete blank until just before sunrise the next morning—about 2:30 A. M. (R. 330-338.) When he came to, he found himself lying in the brush outside Felixs' cabin, wearing two pair of pants and a shirt, none of which he had ever seen before and having in his possession a strange blanket and a .22-calibre rifle and shells. He followed a trail a short distance to the Felix cabin and there

discovered the dead bodies of Ahnstrom and Harris. In the mouth of the latter body he saw a cigarette and beside it lay his own khaki shirt. He said that he became panicky and took to the woods, carrying the blanket and rifle with him, and hid out for about ten days, or until he was apprehended and taken to jail at Fairbanks, Alaska. He claimed to have "blacked out" for five hours several years before at a drinking party. (R. 338-344, 352, 353.)

On cross examination the defendant made the following admissions: (1) That he had bought Camel cigarettes on July 20, 1947; (2) that the khaki shirt found on Ahnstrom's body was the one that he (defendant) wore into the Felix cabin on July 20, 1947; (3) that the trousers found at the valve box were "similar" to the ones he was wearing in the Felix cabin; and (4) that he had previously been convicted of a crime (R. 351, 355, 361); but he denied positively that he had killed either Harris or Ahnstrom. (R. 360, 361.)

The jury that tried the charges against the defendant for the killing of Harris and Ahnstrom brought in a verdict of guilty of murder in the first degree on each charge; whereupon the defendant moved for a new trial in both cases on the ground, among others, of newly discovered evidence. He supported his motion by affidavits to the effect that, approximately three years before the homicides at Little Gerstle, Harris had alienated the affections of the wife of the above mentioned Merle Marie and then lived with said wife; that the men had had a fist fight at Nenana,

Alaska, over the affair; and that Merle Marie still felt vindictive toward Harris. (R. 41-59.) Affidavits of the Government in opposition to the motion for a new trial set forth that Merle Marie was at George Lake, about nine miles distant from Little Gerstle, continuously between Friday, July 18, 1947, and Monday afternoon, July 21, 1947. (Supp. R. 7-12; see also R. 206-209, 369-370.)

ARGUMENT.

I.

DEFENDANT WAS NOT SO INTOXICATED THAT HE WAS INCAPABLE OF FORMING A SPECIFIC INTENT TO KILL AND MURDER.

The appellant commences the argument of his brief with the contention that the undisputed testimony of all the witnesses is that the appellant, if he killed Harris and Ahnstrom, was incapable because of intoxication of purposely and with premeditation and deliberation committing the crimes charged, and, therefore, the jury was precluded from bringing in a verdict of guilty of murder in the first degree in either of the indictments. (Br. 11.) As a matter of fact, the only witness who gave such testimony was the appellant himself, and the jury did not have to believe him, especially in view of the undisputed testimony of Government's witnesses to the contrary.

First, Therriault stated that when Harris and Jones were exchanging blows between the cabins of Felix and Ahnstrom and Jones told Therriault to mind his

own business and get out of there, he, Jones, "seemed to know very well what he was talking about," but Harris was quite drunk and had fallen down once in the scuffle with Jones. (R. 78, 79.)

Ellen Felix testified that Jones and Harris were drunk when they came into her house and their drunkenness frightened the children; but she also stated that Jones gave the baby some money because the baby was crying. Then Jones wanted to go home but Harris objected. "She (meaning Harris) was drunk. Didn't know nothing." Ellen then ordered the men out of the house, and as soon as they got outdoors, she saw Jones fighting Harris. (R. 96, 108-110.)

Frank Felix's testimony was to the effect that Harris and Jones came into his cabin, not drunk but feeling high. The men had two or three drinks in the cabin and played with the children. Soon Mrs. Felix told them to get out; so they went outside and started to fight. Harris was "really drunk so he fell down. He can't walk." Jones was the best fighter and knocked down Harris. Jones seemed to be carrying Harris along toward the car, because the latter was too drunk to walk. About that time Jones got mad and started to "fight Harris, who was too drunk to fight back." (R. 138, 144, 154, 155.)

The laws of Alaska provide that no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species

or degrees of the crime, the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act. Sec. 5341, C.L.A., 1933. Except for the absence of a preliminary clause on insanity as a defense, the Alaska Statute is copied from the Oregon law on the subject. See Oregon Code, 1940 Ed. Sec. 26-929.

In the Oregon case of *State v. Zorn* (22 Or. 591, 30 Pac. 317), the defendant was found guilty of murder in the first degree and sentenced to be hanged. He appealed and assigned as one of the errors the refusal of the Court to give a requested instruction on drunkenness as affecting the intent of the defendant in committing the act, and the instruction actually given by the Court. The opinion of the Supreme Court of the State of Oregon in that case establishes the rule as to how far drunkenness may be proved to show the mental status of the defendant at the time of the commission of the homicide. We quote from the opinion at length:

> "* * * the court instructed the jury as follows: 'If you believe, from the evidence of this case, that the defendant, at the time of the commission of the crime charged in the indictment, was in a state of voluntary intoxication, this fact, of itself, does not render the act less criminal, and in this sense, I charge you, is not available as a defense; but upon the question whether the act was done with deliberation and premeditation, as charged in the indictment, it is proper to be considered by you in connection with all other facts appearing on the trial in determining the degree of guilt.'

Our Code provides that 'no act committed by a person while in the state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.' Hill's Code, Section 1358. All the authorities agree that drunkenness is no excuse for crime. But where, as in this state and others, there are statutes which have degrees of murder, and make deliberation and premeditation ingredients of the crime of murder in the first degree, the question of intent becomes a material fact, and evidence of intoxication is admissible and proper to be taken into consideration by the jury in determining the question as to premeditation and deliberation in murder of the first degree. The defendant's intoxication is submitted to the jury simply for the purpose of showing a want of premeditation. In Ferrell v. State, 43 Tex. 508, the court say: 'The current rule upon this subject is that, although drunkenness neither aggravates nor excuses an act done by a party while under its influence, still it is a fact which may affect both physical ability and mental condition, and may be essential in determining the nature and character of the acts of the defendant, as well as the purpose and intention with which they are done.' The fact of intoxication is not admitted as an excuse for the crime, but as a means of determining its degree, when a question arises as to the particular state of mind of the

accused at the time when he committed a crime. In other words the fact of intoxication is to be submitted to the jury with the other facts in the case for the purpose of enabling them to determine the intent of the accused in committing the act. People v. Williams, 43 Cal. 344; State v. Bell, 29 Iowa, 316; Nichols v. State, 8 Ohio, 435; State v. Mahn, 25 Kan. 182; Haile v. State, 11 Humph. 154; Golden v. State, 25 Ga. 427; 4 Amer. & Eng. Enc. Law, p. 705, tit. 'Criminal Law.' The evidence in this case showed that the defendant was intoxicated when he left Walla Walla, and that he had been drinking heavily, off and on, for two weeks. All the facts in respect to his conduct while he was at his home during the day, and shortly after he shot his wife in the evening, were fully detailed to the jury. The substance of the facts we have set out. If it be true that the defendant was intoxicated at the time he shot his wife, the trial court fully met that aspect of the case when it charged the jury that the fact of intoxication should be considered with the other facts in determining the degree of guilt; that while drunkenness, of itself, could not avail as a defense, yet it should be considered upon the question whether the defendant committed the fact with deliberation and premeditation * * * It seems to us, in the light of the evidence, that the trial court covered by its instructions every ground upon which the defendant could rest its defense, and that there was no error in refusing the instructions asked. In view of the sacredness of life, and the protection which the law throws about it, we have examined carefully the evidence and the instructions given by the trial court so as to guard against any liability to error, and

> to give the defendant every benefit and advantage the law affords; and the result of our deliberation is that we find no error, and that the judgment must be affirmed."

See, also *State v. Weaver,* 35 Or. 415, 58 Pac. 109 and *State v. Morris,* 83 Or. 429, 163 P. 567.

In a first degree murder case, the existence of deliberation and premeditation is always a question for the jury, as is the question of whether the accused's intoxication, if the jury finds that he was intoxicated to some degree, precluded him from forming a specific intent to kill and murder. *State v. Butchek,* 121 Or. 141, 253 Pac. 367, affirmed 254 Pac. 805; *State v. Jukich,* 49 Nev. 217, 242 P. 590; *State v. Butler,* 38 N.W., 453, 34 Pac. (2d) 1100; *People v. Lami,* 1 Cal. (2d) 497, 36 Pac. (2d) 192.

In the opinion in the first of the four cases just cited, it was stated:

> "The defendant asserts that his conviction of murder in the first degree is erroneous because of the absence of all evidence of deliberate and premeditated malice * * * All questions of fact in a criminal case must be decided by the jury. Or. L. Sec. 1544. Direct proof of deliberation and premeditation is not necessary, but may be inferred from facts proved. State v. Ah Lee, 8 Or. 214; State v. Morey, 25 Or. 241, 35 P. 655, 36 P. 573.
>
> "The nature of the homicide in this case, the testimony of the threats against the deceased, and the frequent quarrels between them, shows motive for the crime. Therefore this testimony is

> admissible as evidence for the purpose of establishing deliberate and premeditated intent to take life. Underhill's Criminal Evidence (3d Ed.) Sec. 514; Wharton on Homicide, 155."

On a re-hearing of the same case, the Oregon Supreme Court added:

> "The existence of deliberate and premeditated malice in the killer's mind is the result of a mental condition and is not subject to direct proof. For this reason its existence may be inferred from the tangible facts in evidence. 2 Bishop's Criminal Law, p. 511; Underhill on Criminal Evidence (3d Ed.) p. 709. As supporting this doctrine, see Wharton on Homicide, Sec. 150, 2 Bishop's Criminal Law, Sec. 673, Cyclopedia of Criminal Law, Brill, 1076 and 30 C.J. 142, 143, where it is held that deliberation and premeditation may be inferred, as a matter of fact, from the circumstances, act, conduct, language, the character of the weapon used, and the nature and number of wounds inflicted."

In the *Jukich* case (supra), the appellant was convicted of the crime of murder in the first degree for shooting to death a 15-year-old girl, and the penalty of death was imposed. There was evidence that the appellant had been drinking just prior to the homicide in question, and he claimed to have no memory of the fatal shooting because of intoxication. Said the Nevada Court:

> "Whether appellant's testimony to the effect that he was so intoxicated as to be unconscious of what he was doing was true or not was for the jury

to determine, and was resolved against him by the verdict."

Finally on the question of intoxication, the California Court has followed the general rule stated. This is best expressed in the *Lami* case, supra.

"* * * The weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder in the first degree, are matters essentially for the determination of the trier of the facts. People v. Murphy (Cal. Sup.) 32 P. (2d) 635; People v. Yeager, 19 Cal. 452, 474, 229 P. 40. The evidence offered by the defense does not show that appellant, by reason of the use of intoxicants, was so disordered mentally at the time of the attack on the deceased as to preclude the resultant killing from being of that 'willful, deliberate and premeditated' character designated in Section 189 of the penal code as murder in the first degree. The jury might very reasonably conclude that appellant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts."

The appellant's detailed recollection and reasonable description of the happenings immediately preceding his exit from the Felix cabin, when he claims to have suddenly blacked out and stayed blacked out for some four or five hours, must have convinced the jury that his mind was not so confused or disordered by the consumption of intoxicating liquor as to re-

lieve him from full responsibility for the ordinary consequences of his wrongrul acts. This, and other evidence, may well, and would warrantedly, have caused the jury to reject the appellant's evidence as to the extent of his intoxication and to conclude that he was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts. See *People v. DeMoss,* 4 Cal. (2d) 469, 50 Pac. (2d) 1031.

Appellant also contends that there was no motive on his part shown for the commission of the crimes charged. (Br. 12.) The Government counters that there was ample evidence of motive for the killing of Harris by the appellant as gleaned from the testimony of Therriault and the Felixes that Harris was resisting Jones' efforts to get him (Harris) to return to camp. The rage that was boiling up inside Jones towards Harris is evidenced both by the physical abuse the latter was receiving from the appellant at the time and the angry remarks directed by Jones towards Thierriault.

As for the appellant's motive for killing Ahnstrom, we offer the same reasonable explanation that appellant advanced when he suggested that Merle Marie killed Harris and then killed Ahnstrom so as to forever silence Ahnstrom, the only eye witness to the hatchet attack upon the drunken and helpless Donald R. Harris. (Br. 13.) From all the evidence in this case, the jury was certainly warranted in finding such a motive for the killing of Carl Ahnstrom by the man who killed Harris.

In the case of *State v. Sullivan,* 139 Or. 640, 11 Pac. (2d) 1054, the Oregon Supreme Court quotes with approval the following passages from Dr. Wharton's work on Criminal Evidence relating to motive:

> "When proof has been made of ths corpus delicti in a homicide prosecution, all facts and circumstances that tend to show motive on the part of the accused are relevant and equally relevant are the relations between the accused and the deceased, and all ill feeling that existed between them. The application of the rule is not limited by the remoteness of such circumstances, as that goes only to the weight, and not to the relevancy. There is no rule by which remoteness that may effect the relevancy can be established, but this must be determined from the circumstances of each case. It is not affected by the fact that the crime is out of proportion to the motive sought to be shown * * *
>
> "*Motive in homicide is a question of fact to be determined by the jury; it may be inferred from the crime itself, or from the actions of the accused.* (Italics ours.)
>
> "To show the state of mind of the accused towards the deceased, it is relevant to introduce in evidence facts and circumstances relating to any ill treatment of the accused by the deceased * * * "Not only are quarrels and ill-will relevant in general, but the facts from which a stress of feeling may be reasonably inferred are also relevant * * *" (2 Wharton's Criminal Evidence (10th Ed.) Sec. 895, 896 and 892.)

II.

THE GOVERNMENT EXCLUDED EVERY OTHER REASONABLE HYPOTHESIS THAN THAT OF THE APPELLANT'S GUILT.

Appellant's second point relied upon for a reversal in this appeal can best be summarized in that well known rule of law: to convict an accused person on circumstantial evidence, it is necessary for the prosecution to exclude every other reasonable hypothesis than that of the guilt of the accused. He asserts that "others in the immediate vicinity would have had the same opportunity of committing the crime, and that others had a motive for killing at least one of the deceased persons." (Br. 13.)

We expected appellant to name as such "other persons" at least one of the following: Frank Felix, Ellen Felix, Margaret Jacobs, or Eli Therriault. All of them were known to have been at the scene of the crimes, probably only minutes before the victims met their deaths. But even appellant realized that on no *reasonable* hypothesis could anyone of those persons have been guilty of the ghastly deeds perpetrated at Little Gerstle that evening; so he names none of those mentioned. Instead, he points the finger at one lone "peg-leg" Indian, who had a quarrel with the victim Harris at Nenana, Alaska, two or three years before and whose wife had left him to live with Harris.

Without at this time attempting to establish the whereabouts of Merle Marie on July 20, 1948, the Government maintains that the jury could well have eliminated Merle Marie as the subject of "the other

reasonable hypothesis'' by the following process: Merle ''Peg-Leg'' Marie would not likely have used an ax as his weapon of offense in an encounter with three white men—Jones, Harris, and Ahnstrom. If Merle Marie had no firearms of his own, he knew about the guns at the Indian Village, including the one belonging to Alice Joe (R. 170, 177; Supp. R. 8-12), with anyone of which he could have forearmed himself and which he could have used as the lethal weapon. If Merle Marie had killed Harris and Ahnstrom and he wanted to direct suspicion at the ''blacked-out'' Jones, would he ever have removed Jones' clothing and put his (Merle's) own shirt and trousers upon the sleeping man? Would a man who had just committed two such gruesome murders, have tarried long enough to go through the struggle and effort of putting a pair of his own trousers, let alone two pair, upon a sleeping drunkard? And then would Merle Marie have left his gun and ammunition beside the prostrate Jones to help the latter effect a getaway? Would Merle Marie have scattered his own clothes outside the valve box on the highway to advertise his misdeeds? Would he have gone to the Indian Village, three-quarters of a mile away, to get a blanket for the comfort and protection of Jones, when there was probably plenty of bedding available in the Ahnstrom cabin? And, finally, if he had gone to the Indian Village, would he have killed the four sled dogs, so essential to the Alaska Indian economy?

It is not every hypothesis, but only every reasonable hypothesis except that of guilt, that the circumstantial evidence must exclude. The evidence need not

demonstrate the guilt of accused beyond the possibility of his innocence; and, if the circumstances as proved produce a moral conviction to the exclusion of every reasonable doubt, they need not be absolutely incompatible, on any reasonable hypothesis, with the innocence of the accused. (23 *C.J.S., Crim. Law,* Sec. 907c.) In this case there was no evidence whatever connecting any known person other than Jones with the murders at Little Gerstle. I refer now both to the case in chief and to the evidence set forth in the affidavits and counter affidavits in connection with the motion for a new trial because of newly discovered evidence. It is true that several other persons may have had the opportunity to commit the crime, but such opportunity in others, standing alone, cannot be the basis for a reasonable hypothesis against the guilt of the appellant that would have to be excluded by the Government before a conviction would be warranted. At best, mere opportunity in others to commit the crimes would be a fanciful theory in support of Jones' innocence. (*People v. Patello,* 13 Pac. (2d) 1068, 125 Cal. App. 840.)

It is admitted that evidence showing, or tending to show, that another than accused committed the crime charged is competent (*People v. Dewachter,* 187 N.E. 472, 35 Ill. 266); but even then it should have some probative value. (*Wigmore,* 4th Ed., Sec. 142.) In support of our next proposition, we propose to show that there is no probative value in the evidence offered by appellant to show that Merle Marie could have so brutally murdered Harris and Ahnstrom.

III.

THERE WAS NO ERROR IN THE DENIAL OF THE MOTION FOR A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE.

According to the appellant, the most important point on which he relies in this appeal is the error of the trial Court in overruling his motion for a new trial upon grounds of newly discovered evidence. We presume that he referred to evidence that might cast suspicion upon someone else as the murderer in this case. (R. 14.)

We concede that in a case of circumstantial evidence, every reasonable hypothesis should be explored and evidence which tends to show that another and not the accused committed the offense, or which may create in the minds of the jury a reasonable doubt as to the identity of the slayer, should not be rejected unless it is remote to a degree that it is of no weight. See *Wilkes v. State* (Texas), 280 S.W. 786; *People v. Jones,* 228 N.Y.S. 571.

In the case of *Flewellen v. State* (Texas, 1929), 18 S.W. (2d) 1087, the Court granted a new trial because of newly discovered evidence that the paramour of the deceased, who had been the chief witness against the appellant, had two weeks prior to the homicide shown the newly discovered witness some bruises on her body which she said deceased had inflicted, and had stated at the time that she (the paramour) was unable to get rid of deceased and that she was going to kill him. In her testimony against appellant at his trial, she claimed to have been sit-

ting alone with deceased on his front porch when she saw appellant come through the gate, advance toward deceased, with his hand behind him, and then threaten to kill deceased. Frightened, she ran away, but heard someone holler twice after she had gone a short distance. Deceased staggered over to a neighbor's house with an ax-like wound in his head, from which he later died. Commenting upon the weight of this newly discovered evidence, the Court said,

> "We are unable to say that it is not reasonably probable that it will change the result if heard by a jury upon another trial."

Clearly distinguishable are the facts surrounding the purported newly-discovered evidence in our own case. Here appellant proposes to show by three witnesses that some two and a half years prior to the homicides at Little Gerstle, an Indian, Merle Marie, had a fist fight at Nenana, Alaska, with the deceased, Donald R. Harris, because about a year before the fight the latter had enticed Merle's wife to leave her husband and live with deceased. (R. 56.) One of these witnesses says that "at all times since the said Donald R. Harris enticed him wife away from him," Merle Marie felt vindictive toward Harris. (R. 55.) But he sets forth no facts in support of that conclusion except for the fight at Nenana. Three jurors who tried the appellant next step forward with the "judicious" announcement that, if they had only known at the time of the trial what they know now (meaning the newly discovered evidence about the old grudge fight at Nenana) the verdict would have been entirely different. (Supp. R. 1-6.)

It happens that a motion for a new trial on newly discovered evidence presents a question of law addressed, not to jurors, but to the sound discretion of the trial Court and denial thereof will be reversed only for manifest error or abuse of discretion. *Ruckman v. Ormand,* 42 Or. 209, 70 Pac. 707; *Stern v. Valz,* 52 Or. 597, 98 Pac. 148. The three jurors in question read only the affidavits of the persons who knew about the fight at Nenana. They knew nothing about the counter affidavits of the five persons who definitely placed Merle Marie at George Lake, nine miles distant from Little Gerstle, during all of the time that Harris and Ahnstrom could have been killed (Supp. R. 8-12); and they seem to have forgotten that the witness Margaret Jacobs testified at the trial that Merle Marie left for George Lake two days before the killings and did not return to Little Gerstle until the day after Harris and Ahnstrom were felled by the ax. Her tertimony was uncontradicted. (R. 207-209, 369, 370.)

Section 5373 of the Compiled Laws of Alaska, 1933, lists the following as one of the grounds for a new trial in criminal cases:

> "Fourth. Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial."

This provision is the same as a like provision in the law of the State of Oregon. See, *Oregon Code Annotated,* 1940 Ed. Sec. 5-802.

By his failure to rebut the statements contained in the counter affidavits to the effect that Merle Marie could not have been at Little Gerstle at the time of the murders there, the appellant robbed his own affidavits of what little materiality they may ever have had. Taking into consideration the inadequacy of appellant's affidavits, the unrefuted facts set forth in the counter affidavits, the testimony given at the trial, the actions and demeanor of the witnesses at the trial, and the facts and circumstances connected with the double murder, the Government declares that in refusing to grant a new trial on the ground of newly discovered evidence the trial Court was clearly acting within its discretion and committed no error. *State v. Morrison* (Idaho), 11 Pac. (2d) 619; *Andrews v. U. S.,* 224 Fed. 418, 139 CCA 646; *State v. Butchek,* 121 Or. 141, 253 P. 367, 254 Pac. 805; *Watrous v. Salem Brewery Association* (1935) 151 Or. 294, 49 Pac. (2d) 375.

At the trial, counsel for appellant tried desperately by Government's witness, Tuttle, to establish that the victim Harris and Merle Marie had both lived at Nenana, Alaska, and that there were hard feelings between them at that time. (R. 364, 371.) This shows that appellant and his attorney, at the time of the trial, and maybe before, had knowledge of the Nenana fist fight. As Nenana is only sixty miles away from Fairbanks, the place of trial, by train, and less by air, appellant, if he had been diligent, could have ascertained the identity of witnesses who knew the facts regarding the fiight and could have produced them at the trial. And, if he had needed more time,

he could have asked for a reasonable continuance to effect his purpose, assuming, of course, that the evidence would have been material. New evidence to support a motion for a new trial must have been discovered since the trial; and it must be such as could not have been discovered before the trial by the exercise of due diligence. *State v. Evans,* 98 Or. 214, 192 Pac. 1062, re-hearing denied 193 Pac. 927; *State v. Magers,* 58 Pac. 892, 36 Or. 38. Appellant appears to have rested confident that he would be able to prove the fact of hard feelings between Harris and Merle Marie by the witness Tuttle. He made no showing that he had no opportunity to question Tuttle privately either at, or before, the trial. He did not exercise due diligence. Further, if Merle Marie was so important to appellant's case, why did not he subpoena Marie, even during the course of the trial?

At page 15 of his brief, appellant interjects a statement which seems to have no bearing on the question at issue here. The statement is to the effect that, if appellant killed Harris at the same time that he killed Ahnstrom, then Ellen Felix and Margaret Jacobs would not have been able to hear Harris moaning when they found Ahnstrom's body and saw appellant on the bridge. The reason that he gives for this assertion is that the neck wound that killed Harris must have caused instant death. The flaw in this argument is that appellant overlooks the fact that Harris had another severe wound across his collar bone which cut through the skin and muscles, but would not have caused death. (R. 215.) The jury could have determined from the evidence that the appellant felled

Harris first with the ax blow across the collar bone and then killed Ahnstrom and went up onto the bridge where the Indian women saw him. After they left, appellant came back to the cabins, and, finding Harris still alive, finished him off with the ax blow at the neck.

The appellant states:

> "The test of whether or not a court errs in refusing a new trial is, would the newly discovered evidence have changed the verdict of the jury." He then cites three cases in support of the proposition. (Br. 15-16.)

Upon reading these cases, we found that in the first one (*State v. Williams,* 86 Pac. 53) the Court concluded that, even though sufficient diligence had been shown by the applicant for the new trial to procure the newly discovered evidence earlier, the award of a new trial on the showing made by affidavits, considered with the counter-showing, would not be justified, especially where the matter is largely within the discretion of the trial Court, and the jury in case a new trial were granted "would be left in about the same position as the one that heard the case before."

In the second case (*Territory v. Claypool,* 71 Pac. 463) the defendants were convicted, one of stealing sheep and the other of purchasing stolen sheep. In support of their motion for a new trial because of newly discovered evidence, they offered the affidavit of a third party to the effect that at about the time the sheep were stolen from their owner, a sheepherder working for the owner disappeared and was no more

heard of in the county. The Appellate Court held that the motion was properly denied, asserting:

> "Even if on a new trial it was proved that one of the herders who had charge of the sheep 'disappeared at or about the same time that the alleged stolen sheep were missed from said herd,' it would probably not change the result of the trial."

In the third and last case cited by the appellant (*State v. Power,* 63 Pac. 1112), the Court did not at all touch upon the point raised by the appellant in this case, Leon W. Jones, but touches only upon the need for the applicant for a new trial to show by affidavit that he could not by reasonable diligence have discovered the new evidence before or at the time of the trial of his case.

So the Government concludes that the appellant has failed to establish any of his points by sound law or reason and, therefore, asks this honorable Court not to disturb the verdict, but to affirm the judgment and commitment of the District Court.

Dated, Fairbanks, Alaska,
January 3, 1949.

Respectfully submitted,

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